

ORIGINAL

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
PENDLETON C. WAUGH, CHARLES M.) EB Docket No. 07-147
AUSTIN, and JAY R. BISHOP)
)
PREFERRED COMMUNICATIONS) File No. EB-06-IH-2112
SYSTEMS, INC.) NAL/Acct. No. 200732080025
)
Licensee of Various Site-by-Site Licenses in) FRN No. 0003769049
the Specialized Mobile Radio Service.)
)
PREFERRED ACQUISITIONS, INC.) FRN No. 0003786183
)
Licensee of Various Economic Area Licenses)
in the 800 MHz Specialized Mobile Radio)
Service)

To: Marlene H. Dortch, Secretary
Federal Communications Commission

Attn: The Honorable Richard L. Sippel
Chief Administrative Law Judge

FILED/ACCEPTED

SEP 11 2009

Federal Communications Commission
Office of the Secretary

**MOTION FOR LEAVE TO SUPPLEMENT
MOTION FOR LIMITED INTERVENTION AND
RENEWED MOTION FOR LIMITED INTERVENTION**

Michael D. Judy, on behalf of himself and the undersigned Movants (collectively "Movants"), hereby seeks leave to file the attached materials as a supplement for the Motion for Limited Intervention and the Renewed Motion for Limited Intervention filed in the above-captioned proceeding July 17, 2009 and September 8, 2009 respectively.

As discussed in the Motion for Limited Intervention, Mr. Judy has filed a complaint in the Court of Chancery of the State of Delaware alleging that Mr. Charles M. Austin lacks legal

authority to exercise any ongoing or future managerial power over the Company, including representing the Company in this proceeding or executing the Settlement Agreement on behalf of the Company.¹ The attached materials are filings Mr. Judy and Mr. Austin have made in the Chancery Court that further explicate the serious legal issues related to the Company's management.

Given the significant questions related to whether Mr. Austin has the authority to represent the Company, as well as the fundamental conflict of interest arising from Mr. Austin's representation of both himself and the Company in this matter, it is critical that the attached documents be included in the record so that the Presiding Judge can consider these issues as he evaluates the purported Settlement Agreement. The Presiding Judge should grant leave for Movants to file the attached materials.

Respectfully submitted,

By: Michael D. Judy
Michael D. Judy

5874 Nees Avenue
Clovis, CA 93611
(559) 246-3979

On behalf of himself and:

¹ See Motion for Limited Intervention at 2-3, Exhibits 1 and 2.

Linda Allen
Kenneth E. Aull
Alison D. Aull
Carole Lynn Downs
Kenneth Fry
Lia R. Gutierrez
James Herrick
Jane Herrick
Jamison N. Herrick
Mary E. Herrick
John Herrick
Sharlene Herrick
Julie Herrick

Marilyn Huckins
Lee Jones
R. J. Leedy
Alan D. Pelton
Kathryn A. Pelton
Neil Alan Scott
Michael A. Scott
John G. Talcott III
Dorothea J. Talcott
John G. Talcott, Jr.
Richard Thayer
Mayr Thayer
Paul P. Tucker
Lyle L. Wells

September 11, 2009

CERTIFICATE OF SERVICE

I, Michael D. Judy, do hereby certify that on this 11th day of September, 2009, the foregoing Motion for Leave to File Supplemental Material was served by first class mail, postage prepaid, on the following persons:

The Honorable Richard L. Sippel Chief Administrative Law Judge Federal Communications Commission 445 12 th Street, S.W., Room 1-C768 Washington, DC 20554	Charles M. Austin Preferred Acquisitions, Inc. Preferred Communications Systems, Inc. 400 E. Royal Lane, 9 Suite N-24 Irving, TX 75039
Gary A. Oshinsky, Esq. Anjali K. Singh, Esq. Investigations and Hearing Division Enforcement Bureau Federal Communications Commission 445 12 th Street, S.W., Room 4-C330 Washington, DC 20554	William D. Silva, Esq. Law Offices of William D. Silva 5355 Wisconsin Avenue, N.W. Suite 400 Washington, DC 20015-2003 Attorney for Pendleton C. Waugh
Jay R. Bishop P.O. Box 5598 Palm Springs, CA 92262	


Michael D. Judy

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MICHAEL D. JUDY)	C.A. No. 4662-CC
)	
Plaintiff,)	
)	
v.)	
)	
PREFERRED COMMUNICATION)	
SYSTEMS, INC., a Delaware corporation,)	
)	
Defendant.)	
<hr/> MICHAEL D. JUDY)	C.A. No. 4720-CC
)	
Plaintiff,)	
)	
v.)	
)	
PREFERRED COMMUNICATION)	
SYSTEMS, INC., a Delaware corporation,)	
)	
Defendant.)	
<hr/> MICHAEL D. JUDY)	C.A. No. 4721-CC
)	
Plaintiff,)	
)	
v.)	
)	
PREFERRED COMMUNICATION)	
SYSTEMS, INC., and CHARLES M. AUSTIN,)	
)	
Defendants.)	

PLAINTIFF'S CONSOLIDATED MOTION FOR SUMMARY JUDGMENT

Plaintiff Michael D. Judy, by and through his undersigned counsel and pursuant to Court of Chancery Rule 56, hereby moves for summary judgment on all claims in his complaints under Section 220 (C.A. No. 4662-CC) and Section 211 (C.A. No. 4720-CC), as well as his claims for declaratory judgment (C.A. No. 4721-CC). The grounds for the motion are set forth in the accompanying Brief in Support of Plaintiff's Consolidated Motion for Summary

Judgment. For the reasons stated in the brief, Plaintiff seeks entry of the proposed order filed herewith.

POTTER ANDERSON & CORROON LLP

By: /s/ Peter J. Walsh, Jr.
Peter J. Walsh, Jr. (#2437)
Janine M. Salomone (#3459)
R. Christian Walker (#4802)
Cara M. Grisin (#5181)
Hercules Plaza, 6th Floor
1313 North Market Street
P.O. Box 951
Wilmington, Delaware 19899-0951
(302) 984-6000

Attorneys for Plaintiff Michael D. Judy

Dated: September 9, 2009

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2009, a copy of the within document was served upon the following in the manner indicated:

BY E-MAIL & FIRST CLASS MAIL

Charles M. Austin
7545 Cortina Avenue
Atascadero, CA 93422

BY FIRST CLASS MAIL

Preferred Communication Systems, Inc.
P.O. Box 153164
Irving, TX 75015-3164

/s/ Peter J. Walsh, Jr.

Peter J. Walsh, Jr. (#2437)

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MICHAEL D. JUDY) C.A. No. 4662-CC

Plaintiff,)

v.)

PREFERRED COMMUNICATION
SYSTEMS, INC., a Delaware corporation,)

Defendant.)

MICHAEL D. JUDY) C.A. No. 4720-CC

Plaintiff,)

v.)

PREFERRED COMMUNICATION
SYSTEMS, INC., a Delaware corporation,)

Defendant.)

MICHAEL D. JUDY) C.A. No. 4721-CC

Plaintiff,)

v.)

PREFERRED COMMUNICATION
SYSTEMS, INC., and CHARLES M. AUSTIN,)

Defendants.)

**BRIEF IN SUPPORT OF PLAINTIFF'S
CONSOLIDATED MOTION FOR SUMMARY JUDGMENT**

POTTER ANDERSON & CORROON LLP

Peter J. Walsh, Jr. (#2437)

Janine M. Salomone (#3459)

R. Christian Walker (#4802)

Cara M. Grisin (#5181)

Hercules Plaza, 6th Floor

1313 North Market Street

P.O. Box 951

Wilmington, Delaware 19899-0951

(302) 984-6000

Attorneys for Plaintiff Michael D. Judy

Dated: September 9, 2009

TABLE OF CONTENTS

	<u>PAGE</u>
PRELIMINARY STATEMENT	1
NATURE AND STAGE OF THE PROCEEDINGS	3
STATEMENT OF FACTS	5
A. The Parties	5
1. Plaintiff	5
2. Defendants	6
B. Background	6
1. The Certificate of Incorporation	6
2. PCS Has Not Held An Annual Meeting	8
3. The FCC Licenses And Proceedings	8
C. Judy's Books And Records Demand	11
D. Developments Since Plaintiff Filed The Delaware Actions	12
ARGUMENT	15
I. THE SUMMARY JUDGMENT STANDARD	15
II. PLAINTIFF IS ENTITLED TO INSPECT THE COMPANY'S BOOKS AND RECORDS	15
A. The Standard	15
B. Plaintiff Is A Stockholder And His Demand Complied With The Statute	16
C. Plaintiff Has A Proper Purpose	16
1. Investigating Possible Mismanagement	17
2. Communicating With Other Stockholders Of The Company	18
D. Plaintiff's Stated Purpose Is His True Proper Purpose	19

E.	The Requested Documents Are Necessary And Essential To Satisfy Plaintiff's Purposes And Plaintiff's Request Is Not Overly Broad.....	20
F.	The Company's Privilege Defenses Do Not Circumvent Plaintiff's Right To Inspect The Company's Books And Records.....	21
III.	PLAINTIFF IS ENTITLED TO AN ORDER THAT THE COMPANY CONVENE AN ANNUAL MEETING OF STOCKHOLDERS	21
A.	Plaintiff Has Established A Prima Facie Case Under Section 211	21
B.	This Court Has Discretion In Setting The Meeting Date.....	23
IV.	PLAINTIFF IS ENTITLED TO A DECLARATION THAT AUSTIN IS WITHOUT AUTHORITY TO ACT AS SOLE DIRECTOR OF THE COMPANY.....	24
A.	There Exists An Actual Controversy That Is Ripe For Judicial Determination	24
B.	The Company's Certificate Of Incorporation And Delaware Law Make Clear That Austin Lacks Authority To Act On The Company's Behalf	26
CONCLUSION.....		28

TABLE OF AUTHORITIES

CASES

	<u>PAGE</u>
<i>Deephaven Risk Arb Trading, Ltd. v. Unitedglobalcom, Inc.</i> , 2004 Del. Ch. LEXIS 130 (Del. Ch.).....	17
<i>Del-Chapel Assoc's. v. Conectiv</i> , 2008 Del. Ch. LEXIS 50 (Del. Ch.).....	15
<i>Energy Partners, Ltd. v. Stone Energy Corp.</i> , 2006 Del. Ch. LEXIS 182 (Del. Ch.).....	25
<i>Food & Allied Serv. Trades v. Wal-Mart Stores, Inc.</i> , 1992 Del. Ch. LEXIS 317 (Del. Ch.).....	19
<i>Hoschett v. TSI Int'l Software Ltd</i> , 683 A.2d 43 (Del. Ch. 1996).....	23
<i>Int'l Equity Capital Growth Fund, L.P. v. Clegg</i> , 1997 Del. Ch. LEXIS 59 (Del. Ch.).....	27
<i>Kerkorian v. Western Airlines, Inc.</i> , 253 A.2d 221 (Del. Ch. 1969), <i>aff'd</i> , 254 A.2d 240 (Del. 1969)	19
<i>Madison Ave. Inv. Partners, LLC v. Am. First Real Estate Inv. Partners, L.P.</i> , 806 A.2d 165 (Del. Ch. 2002).....	16
<i>McKesson Corp. v. Derdiger</i> , 793 A.2d 385 (Del. Ch. 2002).....	23
<i>Polygon Global Opportunities Master Fund v. West Corp.</i> , 2006 Del. Ch. LEXIS 179 (Del. Ch. Oct. 12, 2006)	17
<i>Rales v. Blasband</i> , 634 A.2d 927 (Del. 1993)	17
<i>Savin Bus. Machines Corp. v. Rapifax Corp.</i> , 375 A.2d 469 (Del. Ch. 1977).....	22
<i>Saxon Indus., Inc. v. NKFW Partners</i> , 488 A.2d 1298 (Del. 1984)	22
<i>Security First Corp. v. United States Die Casting & Dev. Co.</i> , 687 A.2d 563 (Del. 1997)	17

<i>Seinfeld v. Verizon Comm'cns, Inc.</i> , 909 A.2d 117 (Del. 2006)	17-18
<i>Shay v. Morlan Int'l, Inc.</i> , 1983 Del. Ch. LEXIS 405 (Del. Ch.).....	23
<i>Thomas & Betts Corp. v. Leviton Mfg. Co. Inc.</i> , 681 A.2d 1026 (Del. 1996)	17
<i>Tweedy, Browne, & Knapp v. Cambridge Fund, Inc.</i> , 318 A.2d 635 (Del. Ch. 1974).....	22
<i>XO Commc'ns, LLC v. Level 3 Commc'ns, Inc.</i> , 948 A.2d 1111 (Del. Ch. 2007).....	15

STATUTES

8 <i>Del. C.</i> § 211	Passim
8 <i>Del. C.</i> § 211(c).....	21-23
8 <i>Del. C.</i> § 220	Passim
8 <i>Del. C.</i> § 220(b)	15-16
8 <i>Del. C.</i> § 220(c)(3).....	16
8 <i>Del. C.</i> § 227(b)	24
10 <i>Del. C.</i> § 6501	24

OTHER AUTHORITIES

Ct. Ch. R. 56(c).....	15
Ct. Ch. R. 56(e).....	15

PRELIMINARY STATEMENT

Plaintiff Michael D. Judy ("Plaintiff" or "Judy") is a stockholder of Defendant Preferred Communication Systems, Inc. (the "Company" or "PCS"). Through these consolidated actions, Judy seeks to assert his fundamental rights as a stockholder of PCS. And, by obtaining the basic relief to which he is entitled, including inspection rights and an annual meeting, he hopes to set the Company on a course of action where it can operate and prosper under a qualified and competent board of directors. Currently, the Company is under the control of Defendant Charles M. Austin ("Austin"). Austin holds himself out as the sole officer, sole director, and single largest shareholder of the Company, and operates the Company as if it were a sole proprietorship. Austin, who has appeared *pro se* on behalf of himself and the Company, has no respect for the corporate form or the rights of stockholders other than himself.

Austin has refused Judy's request to inspect books and records of the Company, including documents evidencing the ownership of PCS. To Judy's knowledge, Austin has never caused the Company to hold an annual meeting of stockholders since the Company was formed in 1999. And, even more problematic, Austin has taken, and continues to take, action purportedly in the name of the Company without the authority to do so. The Company currently does not have a fully constituted board of directors. Since 2007, the Amended and Restated Certificate of Incorporation of the Company ("Certificate of Incorporation")¹ has mandated that the Company's board of directors (the "Board") consist of not less than four (4) directors and no more than nine (9). But no additional directors have been appointed or elected because the Company, under Austin's control, has never taken action to fill these seats.

¹ A true and correct copy of the Certificate of Incorporation is attached hereto as Ex. A to Walsh Aff.

Against this backdrop, the Company is facing a critical period in its corporate life. While one might assume that a corporate defendant which appears before this Court without counsel is lacking any significant value, PCS actually has substantial worth. By Austin's own admission, millions of dollars have been invested in PCS. The Company holds valuable licenses granted by the Federal Communications Commission (the "FCC"), which licenses, if properly managed, could allow the Company to develop into a credible player in the wireless telecommunications industry. But certain of its licenses have received unfavorable treatment from the FCC. That matter is now the subject of an appeal in federal district court. Relatedly, the FCC's Enforcement Bureau initiated its own proceedings before the FCC against Austin, the Company, and certain stockholders of the Company regarding actions taken, and representations made by, those parties before the FCC. Recently, to resolve that action, Austin caused the Company to enter into a settlement agreement with the FCC, which is under challenge. The chief administrative law judge has invited the parties to reach a new settlement or renew the proceedings, which were stayed pending settlement discussions. In either case, whether by settlement or full resolution of the proceedings, there is a substantial risk that certain or all of the Company's licenses will either be surrendered or revoked. The relief Judy seeks in this action will allow the Company to appoint a governing body that can act in the best interest of the Company and *all* of its stockholders.

NATURE AND STAGE OF PROCEEDINGS

Judy has filed three actions that have been consolidated for purposes of the hearing scheduled for September 29, 2009.

First, on June 12, 2009, Plaintiff filed a Verified Complaint Under 8 *Del. C.* § 220 (C.A. No. 4662) (the “220 Complaint”), seeking inspection of certain books and records of the Company. That action was initiated after Austin, on behalf of the Company, rejected Judy’s written demand under oath to inspect books and records of the Company and its wholly-owned subsidiary, Preferred Acquisitions, Inc. (“PAI”). On July 18, 2009, Austin served an answer to the 220 Complaint (the “220 Answer”).²

Second, on July 8, 2009, Plaintiff filed a Verified Complaint to compel the holding of an annual meeting of stockholders pursuant to 8 *Del. C.* § 211 (C.A. No. 4720-CC) (the “211 Complaint”). On August 14, 2009, Austin served an answer on behalf of the Company to the 211 Complaint (“211 Answer”).

Third, also on July 8, 2009, Plaintiff filed a Verified Complaint For Declaratory And Injunctive Relief (C.A. No. 4721-CC) (the “Declaratory Judgment Complaint”). The Declaratory Judgment Complaint seeks declaratory relief relating to the proper composition of the Board of Directors and Austin’s authority (or lack thereof) to take action on behalf of the Company. That complaint also asserts a second cause of action for breach of fiduciary duty against Austin; however, that cause of action is not before the Court on this motion. On August 10, 2009, Austin served an answer and counterclaims to the Declaratory Judgment Complaint

² Austin is acting *pro se* in his individual capacity as a defendant and also purports to speak for the Company. Counsel for Judy has urged Austin repeatedly to secure counsel for the Company (*see* Walsh Aff. ¶ 3), but to date he has not done so. Accordingly, the undersigned counsel have e-filed Austin’s answers as a courtesy to Austin and the Court.

and counterclaims (the “Declaratory Judgment Answer”). On August 31, 2009, Judy moved to dismiss the counterclaims.

On July 28, 2009, the Court entered an order consolidating these action. A telephonic hearing on the relief sought in each of the three (3) actions (except for the breach of fiduciary duty claim) is set for September 29, 2009.

On September 9, 2009, Judy moved for summary judgment with respect to his 220 Complaint, 211 Complaint, and request for declaratory relief as to the composition of the Board. This is Judy’s Opening Brief in support of that motion.

STATEMENT OF FACTS³

A. The Parties

1. Plaintiff

Judy is the record owner of at least 16,666 shares of Class A Common Stock, which shares represent his initial investment in the Company. (Declaratory Judgment Compl. ¶ 3; Declaratory Judgment Answer ¶ 17.)⁴ He first became a stockholder of the Company on or about February 10, 1999 and, over time, has paid over \$70,000 for his shares of capital stock in the Company. (Judy Aff. ¶¶ 1, 2.) Judy is also the President of Preferred Spectrum Investments, LLC (“PSI”), a group of 17 stockholders of the Company formed in 2009. (Judy Aff. ¶ 4.) Among other things, PSI was formed for the purpose of protecting the member stockholders’ respective investments in the Company and preserving the interests of the Company generally. (*Id.*)

2. Defendants

a. The Company

The Company is a Delaware corporation that was incorporated on or about January 15, 1998. (*See* Ex. A to Walsh Aff., Certificate of Incorporation.) Through the ownership of telecommunications licenses, the Company is in the early stages of development to become a full service wireless telecommunications provider in key market areas across the

³ Reference is made to the (1) Transmittal Affidavit of Peter J. Walsh, Jr. and (2) Affidavit of Michael D. Judy, which are offered in support of Plaintiff’s Consolidated Motion for Summary Judgment and are filed herewith. Citations to these affidavits will appear as “Walsh Aff. ¶ _” and “Judy Aff. ¶ _” respectively. In addition, reference is made to the affidavits of (1) Dr. Neil Alan Scott, (2) Linda Allen, (3) John G. Talcott, III, (4) Dorothea J. Talcott, (5) Lyle L. Wells, and (6) Paul Tucker, shareholders of the Company whose affidavits are offered in support of Plaintiff’s Consolidated Motion for Summary Judgment. These affidavits will be cited collectively as “Stockholder Aff. ¶ _” and are filed herewith as Exhibit L to the Walsh Aff.

⁴ Since this initial investment, Judy’s total stock purchases in the Company have amassed to approximately 89,000 shares of capital stock of the Company. (Judy Aff. ¶ 2.) He holds stock certificates evidencing his ownership of all shares issued to him by the Company, except those shares that he owns pursuant to a two-for-one forward split of the Class A Common Stock. (Judy Aff. ¶ 3.)

United States and Puerto Rico. (Declaratory Judgment Compl. ¶ 4; Declaratory Judgment Answer ¶ 17.) Although in its developmental infancy and without a current source of revenue, the Company, given its potential, has been well-funded by investors. (See July Aff. ¶ 2.) By Austin's own admission, at least \$40 million has been invested in the Company. (Declaratory Judgment Answer ¶ 63.)

b. Austin

Austin (together with the Company, the "Defendants") purports to own over 75% of the Company's voting stock. (Declaratory Judgment Answer ¶ 13.)⁵ Austin claims to be the Company's sole officer (Declaratory Judgment Answer ¶ 58), holding the titles of President (Declaratory Judgment Answer ¶ 11) and CEO (Declaratory Judgment Answer ¶ 41). Austin also claims to be the Company's sole director. (Declaratory Judgment Answer ¶¶ 13, 17, 58.)

B. Background

1. The Certificate of Incorporation

Since its incorporation in 1998, the Company has amended and restated its certificate of incorporation twice, most recently on March 27, 2007. (See Ex. A to Walsh Aff., Certificate of Incorporation.) As amended and restated, the Certificate of Incorporation authorizes the issuance of Preferred Stock (Article Fourth) and further designates a series of such Preferred Stock known as Series A 6% Cumulative Convertible Preferred Stock (the "Series A Preferred Stock"). (*Id.* at Article Fourth, § 2(a).) Under Article Fourth, § 2(f)(iii), of the Certificate of Incorporation,

[T]he holders of the Series A 6% Cumulative Preferred Stock shall have the exclusive and special right, voting separately as a class, to elect up to one (1) director of the Corporation (the "Series A

⁵ One glaring omission from Austin's filings with this Court is a statement as to his total monetary investment in the Company. To Mr. Judy's knowledge, Austin has made no monetary investment in the Company, despite his purported ownership of 75% of the common stock. (Judy Aff. ¶ 10.)

Director”) at any annual meeting of the stockholders, at any special meeting of the stockholders called as herein provided or, if then permitted by the Certificate of Incorporation or Bylaws of the Corporation, by written consent in lieu of a meeting of stockholders. Such voting power shall continue to be vested in the holders of Series A 6% Cumulative Convertible Preferred Stock until 100,000 or less shares (or such greater or lesser number of shares as shall be outstanding with respect to such shares following any reclassification, subdivision or combination of such shares) of Series A 6% Cumulative Convertible Preferred Stock shall be issued and outstanding. During all periods in which such special voting power shall still be conferred upon holders of the Series A 6% Cumulative Convertible Preferred Stock, the Board shall consist of no less than four (4) and no more than nine (9) members.

(*Id.* at Article Fourth, § 2(f)(iii).)

Since 2007, greater than 100,000 shares of Series A Preferred Stock of the Company have been issued and outstanding. (Declaratory Judgment Compl. ¶ 24; Declaratory Judgment Answer ¶ 25.) Accordingly, the holders of the Series A Preferred Stock have had the right to elect a director to the Board.⁶ As further provided by the above-quoted provisions of Article Fourth, under the present circumstances, the Board “shall consist of no less than four (4) and no more than nine (9) members.” Currently, the Board has only one director—Austin. (Declaratory Judgment Answer ¶ 13, 17, 58.)

2. PCS Has Not Held An Annual Meeting

To Judy’s knowledge, PCS has never held an annual meeting since it was incorporated more than ten (10) years ago. (Judy Aff. ¶ 5.) Whether or not such a meeting has ever been held, it is indisputable that no annual meeting of stockholders has been held in the past 13 months. (*Id.*) Austin has ignored the requests of Judy and other stockholders for an annual

⁶ Austin admits the holders of Series A Preferred stock currently have the right to appoint a director to the Board. (See Declaratory Judgment Answer ¶¶ 71, 73.)

meeting of stockholders. (Judy Aff. ¶¶ 5, 8; Stockholder Aff. ¶ 1-2; Ex. F to Judy Aff., Stockholder Letters.)

3. The FCC Licenses And Proceedings

a. The FCC Licenses

The Company owns approximately 77 site-based Specialized Mobile Radio (“SMR”) licenses (the “Site-Based Licenses”)⁷ in the U.S. Virgin Islands and Puerto Rico, which Site-Based Licenses were issued to the Company by the FCC. (Declaratory Judgment Compl. ¶ 6; Declaratory Judgment Answer ¶ 18.) Through its wholly owned subsidiary, PAI, the Company also owns 38 SMR economic area (“EA”) licenses covering areas along the eastern seaboard, the western coast of California, Puerto Rico, and the U.S. Virgin Islands (the “EA Licenses” and together with the Site-Based Licenses, the “FCC Licenses”). (*Id.*) PAI obtained these EA Licenses in 2000, when it was made a successful bidder at the so-called Auction No. 34 conducted by the FCC. (*Id.*)

The FCC Licenses are potentially extremely valuable,⁸ constitute substantially all of the Company’s assets, and are the Company’s main source of potential revenue. (Declaratory Judgment Compl. ¶ 6; Declaratory Judgment Answer ¶ 18; Ex. G to Judy Aff., Kagan Appraisal.) By Austin’s own admission, the Company paid \$32 million for the EA licenses alone. (Declaratory Judgment Answer ¶ 61.)

⁷ The Company originally owned 86 site-based SMR licenses, but Austin failed to renew 9 of them.

⁸ Pursuant to an opinion by Kagan Media Appraisals (“Kagan”), attached as Exhibit G to Judy’s Affidavit, Kagan concludes that the fair market value of the 800-900 MHz SMR spectrum licenses owned by the Company (as of October 24, 2005), is between \$225.3 million and \$153.6 million.

b. The FCC Proceedings

i. The “Rebanding” Proceeding

The Company’s FCC Licenses, however, may be jeopardized by two proceedings that were initiated before the FCC. The first proceeding pertains to the FCC’s rebanding of the 800 MHz band. The Company holds licenses in the 800 MHz band that are interleaved with emergency response frequencies, as do other companies such as Nextel Communications, Inc. (“Nextel”). (*See* Declaratory Judgment Compl. ¶¶ 7, 14.) The FCC prohibited licensees from creating harmful interference in the 800 MHz band; however, in-band interference occurred and gave rise to complaints from public safety authorities. (*See* Declaratory Judgment Compl. ¶¶ 8-9; Declaratory Judgment Answer ¶ 18.)

To remedy this concern, Nextel, in alliance with certain trade associations (which alliance became known as the “Consensus Parties”), made a proposal to the FCC that Nextel abandon its existing interleaved spectrum in the 800 MHz band and relocate its operations into a contiguous band of spectrum. (Declaratory Judgment Compl. ¶ 10; Declaratory Judgment Answer ¶ 18.) The FCC accepted Nextel’s proposal and awarded it a nationwide license for 10 MHz of continuous radio spectrum in the 1.9 GHz band. (Declaratory Judgment Compl. ¶ 12; Declaratory Judgment Answer ¶ 18.) When the Company applied for the same right, it was denied on the basis that exclusive rights in the 1.9 GHz band were granted exclusively to other licensees, including Nextel. (Declaratory Judgment Compl. ¶ 13; Declaratory Judgment Answer ¶ 18.)

In July and December 2004, the FCC issued its decision on the matter through a series of orders (the “Rebanding Orders”). (*See* Declaratory Judgment Compl. ¶ 15; Declaratory Judgment Answer ¶ 18.) In response, the Company filed a Petition for Reconsideration with the FCC on December 22, 2004. (Declaratory Judgment Compl. ¶ 16; Declaratory Judgment

Answer ¶ 18.) In early 2006, the Company also filed a Petition for Review in the U.S. District Court of Appeals for the District of Columbia in an action styled *Preferred Communication Systems, Inc. v. Federal Communications Commission and the United States of America*, Case No. 06-1076 (the “District Court Action”), seeking reconsideration of the FCC’s determination in the Rebanding Orders. (*Id.*) The FCC responded to the District Court Action by seeking to dismiss or delay such action. (*Id.*) The District Court Action remains pending subject to the outcome of the FCC Hearing.

ii. The FCC Enforcement Bureau Proceeding

In July 2007, a second proceeding was initiated by the FCC Enforcement Bureau, styled *In the Matter of Pendleton C. Waugh, Charles M. Austin, and Jay R. Bishop, Preferred Communication Systems, Inc., Preferred Acquisitions, Inc.*, E.B. Docket No. 07-147 (the “FCC Hearing”). (220 Compl. ¶ 7; 220 Answer ¶ 7.) The FCC Hearing relates to numerous issues, including, among other things (a) whether the principals of the Company and PAI (including Austin) made misrepresentations and/or lacked candor in its dealings with the FCC; (b) issues relating to certain stockholders’ ownership interests in the Company, the outcome of which could affect Austin’s purported control over the Company; (c) alleged transfers of control of certain licenses held by the Company without FCC approval; and (d) the qualifications of the Company, PAI, and their principals to be and remain FCC licensees. (*Id.*) A risk posed by the FCC Hearing is that it could result in the cancellation or revocation of the FCC Licenses. (Declaratory Judgment Answer ¶ 63.)

On March 11, 2009, the FCC Hearing was suspended while the parties sought to negotiate a settlement. (Declaratory Judgment Compl. ¶ 20.) Of great concern to Judy and other stockholders of PCS, the Company is not represented by counsel in the FCC Hearing. Rather,

Austin, who is himself an individual respondent in the FCC Hearing, purports to speak on behalf of the Company. Austin does not contend otherwise.

PSI—the stockholder group formed to preserve and protect the Company’s interests and the investments of its members in the Company—sought to intervene in the FCC proceeding; to date, however, it has not been permitted to do so.⁹

C. Judy’s Books And Records Demand

Concerned that Austin’s handling of the FCC Hearing could cause the Company irreparable harm, and in light of increasing concerns of mismanagement of the Company, Judy, by letter dated May 29, 2009, made a written demand to inspect certain books and records of the Company and PAI, pursuant to 8 *Del. C.* § 220 (the “Demand”). (220 Compl. ¶ 11.)¹⁰ The Demand stated Plaintiff’s purposes for seeking such inspection: (a) to assist Plaintiff in communicating with other stockholders of the Company on matters relating to their interests in the Company; and (b) to assist Plaintiff in investigating possible mismanagement of the Company by the officers and directors of the Company, including, but not limited to, any mismanagement associated with a failure to protect or renew the Company’s interests in the FCC Licenses. (Ex. A to 220 Compl., Demand.) The Company, through Austin, responded to the Demand by letter on June 5, 2009, and made a blanket and baseless rejection of all of Judy’s requests. (See Ex. B to 220 Compl.) After the Demand was rejected by Austin in the name of

⁹ PSI has even offered to contribute the funds necessary to pay the Company’s license renewal fees to preserve certain of the FCC Licenses that would otherwise expire. (Declaratory Judgment Compl. ¶ 18.) Austin refused the offers, thereby precluding the Company from obtaining effective legal representation in connection with the FCC Hearing and subjecting certain of its licenses to possible expiration. (See Declaratory Judgment Compl. ¶ 18.) Separately, another investor group, Preferred Investor Association (“PIA”), sought to intervene on behalf of the Company and PAI, but this attempt was likewise opposed by Austin and the FCC. (Declaratory Judgment Compl. ¶ 18.)

¹⁰ A true and correct copy of the Demand was filed as Exhibit A to the 220 Complaint. By way of background, this Demand is not the first time that Judy has requested inspection of books and records of the Company. For example, in November 2008, Judy requested certain books and records from the Company, but was not permitted access. (Judy Aff. ¶¶ 6-7.)

the Company, Judy filed the 220 Complaint, on June 12, 2009, seeking an order summarily requiring the Company to allow Plaintiff to inspect the same books and records requested in the Demand.

On July 8, 2009, Plaintiff filed the 211 Complaint seeking the Court to order the Company to convene an annual meeting pursuant to 8 *Del. C.* § 211. Concurrently with the filing of the 211 Complaint, on July 8, 2009, Plaintiff filed the Declaratory Judgment Complaint, seeking, among other things, a declaration that Austin does not have the authority to take corporate action on behalf of the Company, because the Board is not validly constituted under the Company's Certificate of Incorporation.

D. Developments Since Plaintiff Filed The Delaware Actions

On July 17, 2009, Judy (and others) filed a Motion for Limited Intervention ("Intervention Motion") in the FCC Hearing, seeking an abeyance of pending settlement negotiations until this Court could consider the pending summary matters. (Ex. C to Walsh Aff., Motion for Limited Intervention.)

In early August, 2009, Austin purported to enter into a settlement agreement by and among the Enforcement Bureau of the FCC, the Company, PAI, Austin, and Jay R. Bishop (the "Settlement Agreement"). (Ex. E to Walsh Aff., Notice of Filing (attaching Settlement Agreement).) The Settlement Agreement purports to, among other things, (a) require the Company to surrender certain of the FCC Licenses (listed on Attachment C thereof), which licenses constitute a substantial portion of all of the FCC Licenses; (b) require the company to make a "voluntary contribution" to the United States Treasury in the total amount of \$100,000 (paid in installments)—essentially a fine to be paid by the Company; and (c) require the

Company to elect or appoint at least one additional director to the Company's Board and recruit a chief operating officer and chief financial officer for the Company and PAI. (*Id.*)¹¹

On August 5, 2009, an Administrative Law Judge issued an order approving the terms of the Settlement Agreement (the "Approving Order"). (Ex. D to Walsh Aff., Order issued August 5, 2009; *see* Declaratory Judgment Answer ¶ 8.) On August 12, 2009, a Notice of Appeal of that Approving Order was filed by Pendleton C. Waugh ("Waugh"),¹² a party to the FCC Hearing, but who did not consent to the Settlement Agreement. (Ex. G to Walsh Aff., Notice of Appeal.) It is likely that the Waugh appeal acts to toll the period for the Approving Order to become final. (*See* Ex. E to Walsh Aff., Notice of Filing (attaching Settlement Agreement), ¶ 2(k).) In addition, an effect of the Approving Order was to render the Intervention Motion moot, and therefore, the parties who filed the Intervention Motion, including Judy, also appealed the Approving Order. (Ex. F to Walsh Aff., Appeal.)

On August 20, 2009, due to separate filings by Waugh in the FCC Hearing, stating essentially that he did not have an opportunity to be heard before the Settlement Agreement was entered, the Chief Administrative Law Judge in the FCC Hearing decided to hold the Approving Order in abeyance pending further order. (Ex. H to Walsh Aff., Order issued August 20, 2009.) The Chief ALJ also ordered the signatories to the Settlement Agreement to submit a factual statement to the FCC detailing the circumstances and occurrences leading up to the execution of the Settlement Agreement, particularly addressing whether Waugh was given an opportunity to participate in those negotiations. (*Id.*) Separately, in the order, the Chief ALJ

¹¹ In requiring the Company to elect or appoint at least one (1) director and a COO and CFO (other than Austin), the FCC obviously also recognizes Austin's complete inability to properly and effectively manage the business and affairs of PCS.

¹² Plaintiff's counsel before this Court, Potter Anderson & Corroon LLP, does not represent Waugh. (Walsh Aff. ¶ 2.) Similarly, PSI's counsel in the FCC proceedings, Wilkinson Barker Knauer LLP, does not represent Waugh. (Judy Aff. ¶ 4.)